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No. 82-1473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DIXIE FINANCE COMPANY, INC., and
TRANSOUTH FINANCIAL CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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I

A recurring theme of the FTC brief in opposition is that misrepresentations concerning a customer's obligation to buy credit insurance are designed to sell the customer credit and not insurance. (*E.g.*, Br. in Opp. 6, 10, 14.) That is not how the court of appeals saw it. The majority of the panel below gave particular emphasis to one thought of the district court's by paraphrasing it in explaining why it was affirming the district court's judgment on its opinion. The majority said that the district court was "eminently correct" in its conclusion that the conduct the FTC is trying to investigate "did not relate to respondents as insurers but as finance companies whose methods of inducing potential borrowers to purchase in-

surance is an integral part of the arrangement of credit and not 'the business of insurance' . . . ." (Pet. 10a; *see id.* at 7a-8a.) We believe that the majority of the court of appeals erred in the view it took of what is and what is not the "business of insurance." But surely it was right when it said that we are concerned here with "methods of inducing potential borrowers to purchase insurance" and did not say that we are concerned with methods of inducing insurance policyholders or prospective policyholders to take out loans.

The FTC's description of what some "unscrupulous lenders" have been known to do makes the point sharply. (Br. in Opp. 10.) These lenders, the FTC says, "misrepresent the need to purchase . . . credit insurance once the credit contract is ready for signature and the prospective borrower is less likely to back out of the deal." (*Id.*) In other words, these lenders act at the most opportune time for selling insurance with the least risk of losing a sale of credit that the salesman hopes has already been clinched. That may be unscrupulous. For a person lacking scruples, it may be an effective way of selling insurance. But running a risk—even a mitigated risk—of losing a sale already made seems at best an indifferent way of selling credit.

In this same passage of its brief in opposition, the FTC says that under the Truth-in-Lending Act, when credit insurance is formally required, the premiums must be included in the annual percentage rate that is disclosed to the borrower. (*Id.*) The agency exaggerates when it says that the cost of credit insurance that is not formally stated to be obligatory constitutes "hidden charges for the loan." (*Id.*) The amount of the premiums must be disclosed if the borrower elects to take the insurance. (Pet. 4.) And if the premiums for optional credit insurance need not be reflected in the quoted annual percentage rate, even if

insurance is misrepresented orally to be obligatory, that is because the Truth-in-Lending Act is so limited.

In *USLIFE Credit Corp.* v. *FTC*, 599 F.2d 1387 (5th Cir. 1979), the court held that the Truth-in-Lending Act is satisfied by a written statement that insurance is optional and contrary oral statements do not affect a lender's duties under that statute. Congress had the chance to consider the limitation imposed by the *USLIFE* decision on the FTC and other agencies that enforce the statute when it undertook a substantial revision of the Truth-in-Lending Act in 1980. It did not amend the statute in any relevant respect. (AFSA Amicus Br. 9.) The failure of Congress to remedy what the FTC sees as an undesirable gap in Truth-in-Lending Act coverage does not open the way for the agency to provide its own remedy through unauthorized encroachment, pursuant to Section 5 of the Federal Trade Commission Act, on the "business of insurance" that Congress has reserved for state regulation.

II

The FTC tries to wish away the seemingly plain inconsistency between the decision below and this Court's decision in *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958), by repeating its theme that the sale of credit and not of insurance is involved here. It speaks of "[m]isrepresentations concerning the optional status of insurance in connection with an extension of credit . . . used to induce deceptively the sale of that credit" and contrasts such misrepresentations with the misrepresentations of *National Casualty*, which concerned "the actual terms, benefits, and limitations of individual policies of insurance . . . ." (Br. in Opp. 14.) For the reasons just stated and those stated in the petition (Pet. 12-13) the FTC's distinction is untenable.

That there is *no* tenable ground of distinction affirmatively appears from the FTC's discussion of *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), and *Union Labor Life Ins. Co.* v. *Pireno*, 102 S.Ct. 3002 (1982). (Br. in Opp. 8-9.) The lessons that the agency says those decisions teach for this case would apply just as well to invalidate the holding of this Court in *National Casualty* that the McCarran-Ferguson Act deprives the FTC of authority to proceed against misrepresentations made in advertising insurance policies.

The agency invokes the three criteria of *Royal Drug* and *Pireno* and says that this case does not satisfy them. It says that "false representations to prospective borrowers that credit insurance is a condition of the extension of consumer credit" do not transfer or spread risk, "one 'indispensable characteristic of insurance,' " quoting *Pireno*, which in turn quoted *Royal Drug*. 440 U.S. at 211-12, quoted in 102 S.Ct. at 3007. And it says that its inquiry into possible misrepresentations does not touch on "an integral part of the policy relationship between the insurer and the insured." 102 S.Ct. at 3009; *see also* 440 U.S. at 215-16.

But the suspected misrepresentations of this case—and the proven misrepresentations of *National Casualty*—are designed to sell insurance policies, and it is the sale of policies that effects the transfer or spreading of risk and brings into being the policy relationship between the insurer and the insured. This Court had no doubt in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969), that "[t]he selling and advertising of policies" is the "business of insurance." That is presumably because it recognized the essential relationship of the sale of policies to the first two *Royal Drug—Pireno* criteria.

So far as the third criterion is concerned, the FTC says that its inquiry "involves noninsurance entities and

affects noninsurance markets." *See* 440 U.S. at 231; 102 S.Ct. at 3009. The suspected misrepresentations in this case are by insurance company agents, as were the proven misrepresentations in *National Casualty*. So much for noninsurance entities.

That a noninsurance market may be involved here does no doubt differentiate this case from *National Casualty* (though not, it should be said, from the conflicting decisions of two courts of appeals).* But the difference raises the question posed by this case. It does not answer it. The question is whether the FTC may investigate and proceed against conduct that is the "business of insurance" merely because the conduct is associated also with some other business that is within the FTC's undoubted jurisdiction.

This Court should resolve that question.

Respectfully submitted,

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